

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Friday, April 24, 2015
11:05 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE LAW CLERK: All rise.

(The Court enters the courtroom at 11:05 a.m.)

LAW CLERK: You may be seated.

We're here for a conference in the case of United States versus Tsarnaev, Criminal No. 13-10200.

Would counsel identify yourselves for the record.

MR. WEINREB: Good morning, your Honor. William Weinreb for the United States.

MR. CHAKRAVARTY: As well as Alope Chakravarty, your Honor.

MS. PELLEGRINI: Good morning, your Honor. Nadine Pellegrini.

MR. MELLIN: Good morning. Steve Mellin.

MS. CLARKE: Judy Clarke, Bill Fick and Tim Watkins for Mr. Tsarnaev.

THE COURT: Okay. Good morning.

COUNSEL IN UNISON: Good morning.

THE COURT: The first matter is, there are a couple of ex parte motions by the defense, so I'd like to excuse the government briefly. My suggestion is that we kind of lock the courtroom so that we don't have people coming in. This is a lobby conference. There's a little side room I think you can just wait in. I don't think this will be long.

(Ex parte proceedings not transcribed and under

1 separate cover.)

2 THE COURT: Okay. There's -- actually, one of the ex
3 parte matters I've just ruled is not ex parte and so the
4 government should be included in it but you haven't seen it
5 yet, so I'll just tell you it exists and await an appropriate
6 response. We won't deal with it now.

7 It's a motion for an order from me for materials from
8 the Massachusetts State Police, Middlesex District Attorney's
9 Office and Waltham Police regarding the Waltham murders. The
00:10 10 defense seeks in camera review of those matters, so, yeah. But
11 I won't expect an on-the-fly response to that.

12 MS. CLARKE: But I could show that I'm handing a hard
13 copy --

14 THE COURT: Yeah. Okay. Fine.

15 Let me just say that on the docket, the document
16 refers to an Exhibit 1 which apparently is a search warrant and
17 application, but it's not included in the filing.

18 Before we get to specific trial evidence issues, can
19 we talk a minute about trial management? I'd like to have an
00:11 20 indication of who the first cadre of defense witnesses will be
21 and what exhibits they'll use, just as we've been doing with
22 the government's case. A couple of days' worth.

23 MS. CLARKE: We should be able to do that, I hope by
24 the end of the day but it looks like it might be tomorrow. But
25 we'll certainly send it. We've provided roughly in order of

1 our anticipated order already the witnesses. And we've trimmed
2 some. So we're trying to make some more cuts today before we
3 provide it to the government. And we're trying to attach
4 exhibits.

5 THE COURT: You know, there's always been some
6 variance here and there. As long as it's within minor
7 toleration, that's okay. The bulk of the information is useful
8 to have sooner rather than later.

9 MS. CLARKE: Yes.

00:12 10 THE COURT: Let me just ask on the cuts department,
11 have you revised at all your overall estimate for the case?
12 I'm just trying to think global planning here. You had
13 originally said a couple of weeks. Is that -- and that would
14 be, I guess, eight full days. Is it still in that range?

15 MS. CLARKE: We still think it could be six or seven.
16 It depends on cross-examination or lack thereof.

17 THE COURT: Okay. Again, I did some long-range
18 planning for this as well. And actually, let me -- let me,
19 just, as long as I broached that subject -- again, this is
00:13 20 longer range, but at some point there will be a verdict, and it
21 will be one thing or another. I would like to start giving
22 some thought to how we schedule subsequent events. I mean, if
23 the penalty decision by the jury is life imprisonment without
24 parole, what does that mean for the other counts that have not
25 been considered, victim participation and so on; and similarly,

1 if the verdict is in the other direction, what steps occur
2 before the formal imposition of that sentence and so on.

3 So I'd just like to begin thinking -- I know, I looked
4 quickly at the *Sampson* case, and my recollection is that the
5 jury returned its verdict just before Christmas and he was
6 sentenced in February formally. I don't know whether that's a
7 standard template, whether that's long or not, and so I would
8 just like some thoughts on that.

9 MR. WEINREB: So, your Honor, I believe yesterday, or
00:14 10 if not yesterday, then perhaps today, an email went out to all
11 of the registered victims soliciting written victim impact
12 statements. And I can't recall whether we gave a deadline. I
13 think we did give a deadline of four weeks. It's possible we
14 said six weeks. But we also informed them that the Court had
15 not yet ruled on whether oral victim impact statements could be
16 given at a sentencing hearing, and we asked them to indicate
17 whether they would desire to give one or not.

18 We would very much like an opportunity for victims who
19 want to give an oral statement to have some opportunity to do
00:14 20 so. It might make sense to wait and see what we hear back from
21 them to determine how much time might be needed, how much time
22 should be allocated for a sentencing hearing and that sort of
23 thing. Of course, it depends on what the Court's inclination
24 is about -- I assume the Court will accept any written victim
25 impact statements, and if we could have some guidance on oral

1 victim impact statements, that might be helpful in coming up
2 with how much time we'll need.

3 THE COURT: Well, it's not something I've given a lot
4 of thought to, which is why I raised it. I mean, I guess I
5 don't want to speak extemporaneous on the subject, so we'll think
6 about -- but I guess the time frame that you suggested could
7 put their response sometime after we get a verdict in this
8 phase. So we wouldn't have that -- and I guess that concerns
9 me a little bit because we would end with a verdict being
00:15 10 delivered and not know what to do next.

11 MR. WEINREB: Well, we were initially just going to
12 ask for -- well, let me step that back for a moment. So the
13 Federal Death Penalty Act says that if it's in a capital case,
14 there shall not be a pretrial -- or rather, a probation report.
15 But of course, there were 13 counts that aren't capital counts,
16 and under the federal rules normally there would be some kind
17 of presentencing report. Normally it would take three months
18 to produce that.

19 I think given the degree to which every aspect of the
00:16 20 defendant's character and so on will be examined during the
21 penalty phase, there's probably no need for --

22 THE COURT: Right. It can be waived under Rule 32.

23 MR. WEINREB: Exactly. But nevertheless, in order to
24 fulfill our duties, and as we see it the Court's duties under
25 the Victim and Witness Rights Act, we'd need some time to

1 organize all the materials, make sure everyone's had an
2 opportunity to present them. So we were going to just suggest
3 60 days from the date of the jury's verdict for a sentencing
4 hearing.

5 THE COURT: And just run right through into the
6 imposition of sentence, then, after that? In other words, I
7 think -- again, this is a bit from memory so it's -- I'm not
8 sure it's accurate, but I think in the *Sampson* case there was a
9 hearing in January and then the sentence was actually imposed
00:17 10 in February, but I don't know that there are any non-capital
11 counts in that case. I just -- I don't know the answer to
12 that.

13 MR. WEINREB: So I hadn't really given any thought to
14 whether there would be time between the conclusion of the
15 sentencing hearing and the imposition of sentence. In a way,
16 that's really a matter for the Court, how much time the Court
17 needs to respond.

18 THE COURT: Right. I guess I mean any substantial
19 amount of time.

00:18 20 MR. WEINREB: I don't think the government sees any
21 need for it. The idea -- we envisioned perhaps a multi-day
22 sentencing hearing if there are quite a number of victims who
23 want to be heard, but at the end of it sentence could be
24 imposed from the government's point of view.

25 THE COURT: Okay. Ms. Clarke, any views?

1 MS. CLARKE: Not right now.

2 THE COURT: With either alternative.

3 MS. CLARKE: Judge, my experience is that typically
4 the Court would -- having not experienced a death verdict, the
5 Court would typically order a presentence report on the
6 non-capital counts to make those sentencing judgments. And the
7 Bureau of Prisons, my experience is, often wants some
8 background information to follow the inmate to wherever he
9 goes. So we might have to consider those issues. But I think
00:18 10 we'll be better prepared to address it having had the Court
11 raise the question later.

12 THE COURT: Okay. Good.

13 MR. MELLIN: Your Honor, if I may, just from my own
14 experience in having two death verdicts that were returned, in
15 one the court immediately imposed sentence just after the
16 verdict was returned, and the other we waited until the next
17 business day for the court to actually announce the imposition
18 of sentence. Those were done quickly.

19 I think this case certainly is a little different in
00:19 20 that you have the magnitude of the victims in this case that is
21 just unheard of compared to other cases. So I do think there's
22 certainly time for the Court to entertain additional victim
23 impact evidence if the Court wishes to.

24 THE COURT: Do those cases involve non-capital counts?

25 MR. MELLIN: They did. They did. And the Court may

1 wish to reach out to Judge Surrick in the Eastern District of
2 Pennsylvania in the *Kaboni Savage* case. That case did involve
3 additional counts, but like I said, Judge Surrick waited I
4 think until the next business day, which I think was a Monday,
5 to impose sentence.

6 MR. WEINREB: I guess as long as we're discussing it,
7 I'll just add one other thing, which is to the extent there are
8 any 924(c) counts on which a sentence of death is not
9 recommended, there was conceivably room for dispute over what
00:20 10 the actual sentence -- whether there's a mandatory minimum
11 sentence of life imprisonment versus 30 years or so on for
12 those, I don't know whether the defense will dispute it or not
13 but it's just -- I'll preview that issue. And then there are a
14 couple of counts for which a guidelines calculation would need
15 to be made. There's no minimum mandatory at all. So we would
16 want to leave some kind of room to do that.

17 MS. CLARKE: And one final thought, just for the Court
18 to begin to think about is if there is a death sentence, I'm
19 sure there will be some analysis of post-trial motions, so
00:21 20 we'll need some time for the filing of those. So that could
21 affect scheduling.

22 THE COURT: Right. Right. Okay.

23 So to return to the motion we discussed last week,
24 which was the government's motion in limine regarding certain
25 expert testimony, I think some controversy seems to be

1 shrinking as to some of these matters. And I guess my general
2 inclination is we'll have to see what actually gets offered and
3 deal with it that way. And in particular, I'm thinking of
4 Professor Reynolds' collateral materials, if he has PowerPoint.
5 The defense response indicates it's been reduced rather
6 significantly, and as I understand, it tends to come from the
7 defendant's computer, so it's materials that have been
8 previously -- at least seen by the government. So I don't know
9 what the final package would look like. That will help define,
00:22 10 I imagine, what the scope of his testimony is going to look
11 like as well.

12 So I think for those we have to sort of wait and see
13 what the circumstances are when the witnesses arrive.

14 MR. WEINREB: Your Honor, we'd just ask, though, that
15 there be a general understanding that Professor Reynolds is
16 here to testify about matters within his expertise as a
17 historian of Chechen -- of the Middle East -- or of the part of
18 the east that he's an expert in and not a psychologist.

19 THE COURT: All of the experts will be expected to
00:22 20 testify only within their field of expertise.

21 MR. WEINREB: And then Dr. Giedd is the main one that
22 I think we need a ruling on.

23 THE COURT: Yeah, I guess we -- yes, all right. So
24 with respect to Dr. Giedd, I mean, again, if his testimony is
25 as proffered, which is his generalized testimony about

1 adolescents as a class, then it may be given. He can't stray
2 into evidence about a particular adolescent, if that is what he
3 is at age 19, and so...

4 MR. WEINREB: Well, our argument was that generalized
5 testimony about adolescents should be excluded because it's not
6 individualized to the defendant. If that objection is
7 overruled, then we would ask that the Court grant the
8 government's motion to obtain the defendant's CT films from
9 the --

00:23 10 THE COURT: All right. So that gets to the next one.

11 So, yes, I do -- I will permit the generalized
12 testimony about adolescents or young men in the defendant's
13 range as a general segment of the population and what that
14 means for brain development generally.

15 MR. WEINREB: And then the other thing we'd ask is we
16 have an expert who would be testifying in rebuttal who would
17 like to be here for Dr. Giedd's testimony, and he's out of
18 state and will need several days' advance notice of when
19 Dr. Giedd will be testifying so that that person can make
00:24 20 arrangements.

21 THE COURT: I'm assuming that won't be a problem?

22 MS. CLARKE: We're anticipating right now May 5th.

23 THE COURT: May 5th is a Tuesday, if I recall.

24 MS. CLARKE: You know, all of this is subject -- we're
25 giving as much as we can. Maybe it's May 4th, maybe it's May

1 6th.

2 THE COURT: Okay.

3 MR. WEINREB: Actually, as long as I'm up here, the
4 same thing would be true for Ms. Vogelsang's testimony. We
5 would like to have our expert here when she testifies, and so
6 we need to know roughly, you know, within a day or two when
7 she's going to be testifying. That person also has to fly in
8 from out of state.

9 THE COURT: Okay. So why don't you address your
00:25 10 motion on the CT. I don't know that it's been responded to
11 formally.

12 MS. CLARKE: It hasn't. Your Honor, our position on
13 the CT scans is they're not relevant to anything Dr. Giedd is
14 going to testify about so there's no need to produce them. We
15 did produce, however, in discovery, Mr. Tsarnaev's medical
16 records from BI out of an anticipation that we --

17 THE COURT: The original admission?

18 MS. CLARKE: Yes. The April admission, yes.

19 So they have those, and I guess that's why they're
00:25 20 asking for the CT scans.

21 MR. WEINREB: So, your Honor, we actually
22 independently obtained from Beth Israel Deaconess Medical
23 Center all the defendant's medical records. They were obtained
24 via a court order issued by the magistrate judge in this case
25 when the grand jury was examining the case.

1 But Beth Israel has taken the position that CT films
2 do not fall within the comprehensive scope of her order; that
3 they are protected health information and yet somehow they're
4 not medical records. I'm not exactly sure how they came up
5 with that determination.

6 But they are perfectly willing to provide them so long
7 as they are essentially protected from any kind of attack under
8 HIPAA.

9 THE COURT: Well, assuming that Dr. Giedd will not
00:26 10 give an individualized assessment of the defendant, why are
11 they relevant?

12 MR. WEINREB: On that matter, with the Court's
13 permission, I'll defer that to Mr. Mellin.

14 MR. MELLIN: Well, your Honor, it depends on what they
15 show and they don't show. I mean, I don't think it's fair for
16 the defense to argue that generally an individual has this type
17 of development if Dr. Aguirre is able to look at that and say,
18 That's not appropriate in this case; in fact, in this case the
19 defendant has this development.

00:26 20 THE COURT: That's your expert you're referring to?

21 MR. MELLIN: Correct.

22 THE COURT: Ms. Clarke?

23 MS. CLARKE: Well, I think it's pretty well understood
24 that imaging at a given period of time is imaging at a given
25 period of time and it has nothing to do with the kind of

1 testimony Dr. Giedd will give about the maturation of the brain
2 and adolescence. But, you know, if the Court orders the
3 production of the CT scans, we have a copy and would provide
4 it. We don't think it's relevant.

5 THE COURT: Well, I guess -- so let me see if I'm
6 hearing that correctly. You have an objection to the perhaps
7 relevance as evidence -- it's an evidentiary question -- but
8 will not object to the discovery question about the looking at
9 it.

00:27 10 MS. CLARKE: Yes.

11 THE COURT: In other words, you would provide it
12 preserving your objection to its admission or use?

13 MS. CLARKE: Well, we object to providing it and we
14 also preserve our objection to its admission.

15 THE COURT: Okay. I'll think about it.

16 MS. PELLEGRINI: Your Honor, if I may, actually, I've
17 spoken to Dr. Aguirre, and while it's not yet clear that we
18 would admit it as -- what he feels in order to be fully
19 prepared to give his testimony is to review these records. So
00:28 20 it's part of his preparation, in any event.

21 THE COURT: Okay. And who's the expert?

22 MS. PELLEGRINI: Geoffrey Aguirre, A-G-U-I-R-R-E.

23 THE COURT: And where is he?

24 MR. MELLIN: University of Pennsylvania.

25 THE COURT: Okay. Then I think there are a couple of

1 motions that were very recently filed. It looks like it was
2 Wednesday. One relates to -- one is a motion to compel an
3 immigration parole for a witness.

4 Mr. Fick?

5 MR. FICK: That's correct. And we filed a supplement
6 to that this morning as well.

7 THE COURT: Yes.

8 MR. FICK: So this individual is the -- is the
9 former -- the estranged husband of the defendant's sister and
00:29 10 the brother-in-law of the defendant's uncle. He lived for an
11 extended period of time in the Cambridge home at the time he
12 was still with the defendant's sister. He is the same age as
13 Tamerlan Tsarnaev, and he really has a wealth of information to
14 provide about the family, the dynamics, the chaos and that sort
15 of thing.

16 Interestingly, the government, either yesterday or the
17 day before, produced an FBI 302 from August of 2013 about
18 Mr. Khozhugov which conveys much, although not all, of this
19 kind of information that he could provide. It's a bit puzzling
00:30 20 about why that disclosure came so late since we would view much
21 of the content as mitigating and exculpatory. The government
22 said something to the effect that it was overlooked and it
23 hadn't been classified for some time which is sort of puzzling
24 in its own way given the kind of pedestrian contents in the
25 scheme of security classification and the fact that the

1 government repeatedly earlier in the case indicated there were
2 no CIPA or FISA issues that would arise.

3 In any event, the bottom line is this is an extremely
4 important witness. His parole was denied. It was sort of
5 informally conveyed by one of the agents to one of our
6 investigators that the reason was a concern on the FBI's part
7 that there would be some kind of an incident or a conflict
8 between this individual and the defendant's sister.

9 We explained in some detail about the motion and sent
00:30 10 an email response asking for reconsideration, why that was sort
11 of an unfounded concern especially in light of the
12 extraordinarily stringent security conditions that are being
13 placed on the parolees.

14 And then yesterday there was an additional very
15 peculiar addition to the story which is that parallel to the
16 parole process, Mr. Khozhugov had applied in Kazakhstan for an
17 ordinary U.S. visitor's visa. That was issued to him, we are
18 informed, yesterday morning and then was promptly rescinded
19 later that day when the State Department learned that the
00:31 20 separate parole request had been denied.

21 The bottom line is we really cannot comprehend why
22 this person is not being allowed to come. We think he's an
23 extremely important witness in the case.

24 THE COURT: And what is my authority to order some
25 executive department to do something they have determined they

1 should not do?

2 MR. FICK: Well, the statute and the regulations sort
3 of provide for parole as a way to get in witnesses. It seems
4 to me there's a Fifth and Sixth Amendment right for us to be
5 able to call witnesses who are important to the case. And so
6 to the extent the Court has any -- typically has authority over
7 an executive department to make sure that the rights of a
8 defendant are vindicated, or are protected, I think that same
9 authority would apply here.

00:32 10 I would point to the *Filippi* case which indicated it
11 would be a due process violation or a Fifth Amendment and Sixth
12 Amendment violation for the government not to assist in
13 obtaining parole for a witness.

14 THE COURT: But I think that order was directed to the
15 prosecution team, not to some unrelated department, or formally
16 unrelated, anyway.

17 MR. FICK: I'm not sure the order in that case -- I'm
18 not sure the underlying order in that case -- to whom it was
19 directed, but I think the bottom line was ultimately the
00:32 20 executive in whatever department that controls access to the
21 United States, and to the extent the executive, which is also
22 the prosecuting -- well, it's the branch of government which is
23 prosecuting this case is preventing us from calling an
24 important witness who is willing and able to testify, that is a
25 due process of Fifth and Sixth Amendment violation.

1 THE COURT: Mr. Weinreb?

2 MR. WEINREB: Your Honor, much of what Mr. Fick has
3 said is factually incorrect. I'll say in particular it's our
4 understanding that he was not granted a visa. That's just
5 misinformation. And the reasons given for why the FBI would
6 not request to DHS that he be paroled is that he was charged
7 with a felony crime of violence, which was an assault on his
8 now ex-wife. He pled guilty to a misdemeanor, yet it was still
9 a crime of violence, and then he was found to have violated a
00:33 10 stay-away order.

11 Under those circumstances, the FBI has deemed him a
12 risk to public safety if he's paroled into the country. And I
13 don't think the point is well taken that because he will be
14 kept at a hotel and there will be FBI agents stationed there,
15 that the threat to public safety, indeed, the threat to
16 themselves, should be discounted.

17 A hotel is not a jail and the FBI are not jailers.
18 It's unfair to put that responsibility on the FBI to
19 essentially be jailers, to hold somebody in circumstances
00:34 20 tantamount to custody when the experts in custody, such as BOP,
21 would never dream of keeping somebody in a jail or simply
22 having two people stationed in a hallway or in another room or
23 something to protect the safety of them.

24 I don't think the *Filippi* case is on point for a
25 couple of reasons. First of all, in the *Filippi* case, it seems

1 to me, there was no countervailing reason for not granting
2 parole. You know, the indication in that case was simply that
3 the government ignored all the requests to parole the
4 defendant, and then finally said they only had two days' notice
5 and that it was too late. That's obviously not the situation
6 here.

7 Secondly, that case was decided in, I believe, back in
8 the early 1990s before the technology was readily available to
9 have individuals questioned over a closed-circuit television
00:35 10 live in the courtroom. And if you look at probably the more
11 applicable case, which is *United States versus*
12 *Valenzuela-Bernal*, a Supreme Court case, the Court in that case
13 talks about the executive's different functions, different
14 roles, and the need for the executive to balance them. One is
15 to protect the -- keep the country safe from aliens who live
16 outside its borders, and that that has to be balanced with its
17 other duties under the Constitution, and against -- that also
18 was a case involving Fifth and Sixth Amendment rights. And,
19 for example, the court there held that it was okay for the
00:36 20 United States to deport aliens who might have exculpatory
21 information absent some showing of bad faith or some other
22 kinds of showings. So it's clear that the rights and the
23 interests can be balanced.

24 We think that an appropriate balance to strike here
25 would be to permit this individual to testify over

1 closed-circuit television provided that he agrees to certain
2 conditions that seem reasonable under the circumstances. One
3 is that he swear to tell the truth the way every ordinary
4 witness would even though that oath cannot be enforced by the
5 Court; secondly, that the jury be informed that he's not
6 subject to the pains and penalties of perjury the way other
7 witnesses are; and, third, that he understand and agree that in
8 addition to answering questions on direct examination, he has
9 to answer all questions that are asked of him on
00:37 10 cross-examination truthfully or he may not testify in the first
11 place.

12 So I think that that is a solution that would be fair
13 under the circumstances regardless of what the surrounding
14 legal picture is, what the law is, which I think is not
15 entirely clear, at least not from the cases that were cited in
16 the defense motion, and maybe not even from -- based on a more
17 thorough analysis, and it would avoid having to make a lot
18 of -- do a lot of difficult legal research and make a lot of
19 legal decisions, if a practical solution like that were done.

00:37 20 MR. FICK: Very briefly: The domestic incident we're
21 talking about was in 2008 when both this individual and Ms.
22 Tsarnaev were extremely young. It resolved as a misdemeanor.
23 Our understanding is that in subsequent years after the
24 incident, Mr. Khozhugov applied for, obtained a U.S. visa,
25 visited the United States without incident, went back again.

1 And the chief issue that he's had since is that there's a
2 custody dispute between he and Ms. Tsarnaev about where their
3 son should live, which they've been working out.

4 To suggest that this person had a misdemeanor -- a
5 domestic violence conviction years ago and has subsequently
6 been in the United States without incident, to suggest that
7 he's a threat to public safety is simply -- it doesn't make any
8 sense.

9 You know, at this point in the case, having expected
00:38 10 that he was going to come and now that he is not, our ability
11 within the time we have to present our case, to get somebody to
12 Kazakhstan to make the arrangements to do a closed-circuit
13 presentation, I'm just not sure we can even make that happen
14 still at this point. And the conditions the government wants
15 to put on that, frankly, are uncalled for.

16 Individuals have testified, simply taken the oath over
17 the closed-circuit television in other cases in this court. To
18 the extent there is a basis for a perjury prosecution, it seems
19 extraordinarily remote here, that such an indictment can be
00:39 20 handed down whether somebody is here or not even if they can't
21 be arrested immediately. But the bottom line is to call
22 particular attention to this person and his testimony over
23 hypothetically a closed-circuit connection, to suggest that
24 there's something inherently less trustworthy about it simply
25 devalues for the defense the potential impact of that testimony

1 even more than the fact that we can't get him here in person
2 already does devalue it.

3 So for all of those reasons that is not an appropriate
4 substitute, and really, just the basis for keeping him out,
5 especially given the conditions, especially given the
6 surrounding circumstances of the original incident, simply
7 don't hold water.

8 THE COURT: Where does he live?

9 MR. FICK: He lives in Almaty, Kazakhstan.

00:39 10 THE COURT: So that's a place where you were making
11 arrangements with our IT people to have a connection?

12 MR. FICK: Well, we had talked about the possibility
13 of doing that and some other places. And in talking with the
14 IT people about the technical requirements, the kind of
15 computer we need to buy and the software and that sort of
16 thing, but we had not gotten down to the brass tacks of finding
17 a physical place in Kazakhstan to do it because we sort of
18 decided to cut the other individuals we had thought about
19 bringing in to Moakley, and we had a reason to think that
00:40 20 Mr. Khozhugov would be able to attend in person.

21 MR. WEINREB: Your Honor, just to complete the record
22 in case there's an appeal later on, there were additional
23 factors that went into the FBI's decision. The defendant's
24 sister, who is the witness's ex-wife, initially made a claim of
25 parental kidnapping because the witness took their child out of

1 the country, she claimed, without her permission, against her
2 will. And the defendant may have actually, not wittingly,
3 perhaps, but played a part in that by actually delivering the
4 child to Ruslan Tsarni's house in Maryland, which I believe is
5 the place from where the child had been taken away.

6 And the FBI also has reasons to believe that there's a
7 border security issue here. The witness has indicated a desire
8 to come back to the United States and to remain here, and there
9 is -- any time somebody is in the country, even if they're not
00:41 10 admitted, even if they're just paroled in, there always is an
11 increased risk they will try to find some way to stay in the
12 country. And that's always a concern in these types of
13 situations. So that and other information which...

14 (Counsel confer off the record.)

15 MR. WEINREB: I think I mentioned earlier there was a
16 restraining order which he violated indicating that he is
17 not -- he's either unwilling or unable to abide by judicial
18 restraints on his conduct. And we don't know his willingness
19 or ability to abide by law enforcement restraints on his --

00:42 20 THE COURT: All right. I'll reserve on it. The
21 motion was filed on Wednesday and a supplement filed this
22 morning. Is the government content to rest on your
23 presentation here or do you want to file something?

24 MR. WEINREB: No, we're content.

25 THE COURT: Okay. I'll reserve on it.

1 Then there's a motion to compel production of grand
2 jury testimony or recorded statements of defense witnesses that
3 may be in the government's possession or control, again, filed
4 Wednesday, I guess, to which no written response has been made
5 yet, I think, right?

6 MR. WEINREB: No, your Honor. We did file a witness
7 response. We emailed a copy --

8 THE COURT: Oh, you did? Oh, I haven't seen it.

9 MR. WEINREB: -- and filed it formally yesterday.

00:44 10 (Pause.)

11 THE COURT: Okay. I've read the government's response
12 now.

13 MR. FICK: So, I mean, the legal authority for this is
14 something that's not yet settled in the First Circuit. It's
15 debatable in the reach in allowing *McMahon* -- I think Judge
16 Wolf subsequently recognized in *Salemme* that there's an open
17 question whether there is an obligation to produce these
18 statements of defense witnesses in the government's possession.

19 I think our position is simply as a matter of trial
00:45 20 management and as a matter of simple fairness to be able to
21 deal with possible cross-examination or refreshing the
22 recollection of a witness, that the production of those
23 statements is warranted and within the Court's authority to
24 order them. And beyond that, I think we'd rest on the papers.

25 MR. WEINREB: Your Honor, we'll rest on our papers.

1 THE COURT: Okay. I think at the very least for grand
2 jury materials, in particular, there has to be a particularized
3 need, which is absent. If there is one that develops, then we
4 can reconsider that. And I think otherwise, the motion is
5 denied.

6 I think that's it on my agenda. Anything else?

7 MR. WATKINS: Your Honor, there are a couple of
8 lingering issues. We've all been on trial, of course. I sent
9 a letter to the government concerning a particular BOP witness,
00:46 10 Tony O'Garro. The government has not yet responded to that.
11 It's concerning specific discovery requests as to him.

12 I don't know whether they intend to respond or they're
13 going to object to that. We're trying to sort out the trial
14 management issues.

15 MR. MELLIN: Your Honor, I believe we just received
16 that yesterday.

17 MR. WATKINS: Wednesday -- Tuesday or Wednesday, I
18 believe.

19 MR. MELLIN: We'll have a response.

00:46 20 MR. WATKINS: I know it was recently, but it's a
21 fairly simple question.

22 THE COURT: All right. You've reminded them.

23 MR. WATKINS: Very good.

24 THE COURT: Anything else?

25 MS. CLARKE: And there's another request pending, I

1 think Miss Conrad sent a letter asking for the names of the FBI
2 agents who interviewed the family on April 2011.

3 MR. WEINREB: So, your Honor, we're going to have a
4 motion in limine to exclude all evidence respecting that which
5 we would like a ruling on before we respond. And in addition,
6 any request for the testimony of FBI agents about anything done
7 within their duties needs to be accompanied by a *Touhy* request,
8 and none has been filed in this case.

9 Speaking of motions in limine, we were hoping to get a
00:47 10 pared-down witness and exhibit list earlier so that we would be
11 in a position to file a motion in limine -- we wouldn't waste
12 our time moving in limine to exclude things the defense has
13 decided to cut anyway. But since we're so close to the
14 beginning of trial, we're planning on filing one by the end of
15 today.

16 THE COURT: All right.

17 MR. WEINREB: We'll be moving to exclude a number of
18 defense exhibits. If I could just preview that for the most
19 part to the extent that the exhibits and witnesses relate to
00:48 20 firsthand knowledge of the defendant, his family members, his
21 life growing up and that sort of thing, we are not going to
22 object for the most part. To the extent, however, that the
23 defense is seeking to introduce things like congressional
24 reports with multilevel hearsay in them and basically using a
25 congressman's name on a report to try to give greater weight to

1 the jury and that sort of thing, we are going to object.

2 We're also going to object to the defense seeking to
3 offer 302s or written witness statements, of witnesses who they
4 could call to the witness stand, especially if, as in the case
5 of Mr. Matanov, he is a convicted liar, convicted of giving
6 false statements about the very subject matter of that 302.
7 And it would be essential for the government to have an
8 opportunity to cross-examine him and bring out all the many,
9 many inconsistencies and contradictions in his numerous
00:49 10 statements about these matters over time as well as his prior
11 conviction, his admission that he lied about it and so on, for
12 the jury to decide how much weight to assign that kind of
13 testimony.

14 And then in some ways, the most vexing problem for the
15 government at this point in terms of motions in limine is the
16 digital evidence. So there is to some -- we have gotten a list
17 from the defense of digital evidence that they intend to offer,
18 but that list includes a number of exhibits that are really one
19 exhibit number attached to hundreds and hundreds and hundreds
00:49 20 of files, primarily from Tamerlan's computer, you know,
21 numerous ones of which are obviously, it seems, irrelevant,
22 like, you know, movies about -- I can't remember -- the Mark
23 Wahlberg movie where his best friend is a talking Teddy bear
24 and that sort of thing.

25 And it's very hard -- I mean, it seems to me the

1 burden is on the proponent of the evidence to demonstrate its
2 relevance. It shouldn't be on the government to have to go
3 through every single one of these hundreds of exhibits, guess
4 what its relevance might be, and then explain why it's not
5 relevant. So I don't think it's appropriate for the defense to
6 simply offer wholesale hundreds and hundreds of files, and that
7 appears to be what they're intending to do here.

8 Similarly, there are several items from Katherine
9 Russell's computer, including her entire Internet search
00:50 10 history, thousands of pages long, and various other things
11 without any seeming foundation for saying that it's not really
12 her, for example, it's Tamerlan who made all those searches.
13 We're in a difficult position here.

14 So we intend to simply move in limine to exclude it
15 all and put the burden on the defense to explain why it
16 shouldn't be, but we don't want to appear to be playing games.
17 I mean, we don't want to move to exclude items of evidence that
18 are relevant and that are admissible and that are
19 non-cumulative. We just have no way of knowing because the
00:51 20 defense won't tell us which ones -- or what their theory of
21 relevance is or which ones they actually intend to offer.

22 There's also categories of evidence which are pictures
23 of family members, not the defendant, not Tamerlan Tsarnaev,
24 but numerous cute pictures of Dzhokhar Tsarnaev's niece. It's
25 unclear why 10, 20 pictures of the niece would be relevant and

1 admissible. There are videos -- many videos, primarily from
2 the defendant's phone, of him playing with his niece. And
3 there's audio, so the defendant is essentially talking to the
4 jury through these videos. And again, you know, we don't know
5 what the relevance or significance of them is or why there need
6 to be so many.

7 And so, you know, again, we don't want to appear to be
8 playing games. We know that the defense is opening on Monday
9 and that they are entitled to have some idea as to what
00:52 10 exhibits they're actually going to be permitted to put into
11 evidence and talk about in their opening statement; on the
12 other hand, we haven't been given any notice of what the
13 relevance of this is and what the particular ones are that they
14 actually intend to offer, and now it's Friday.

15 So we'll file it by the end of the day, and we'll do
16 our best.

17 THE COURT: Well, you touched on a point I was going
18 to raise, and that is the opening. I think it's critical that
19 everybody know what exhibits, or other evidence, I guess even
00:53 20 testimony, would be referred to in the opening so that if there
21 is an issue like this, we can address it before that happens.

22 MR. FICK: I think -- my understanding is it makes
23 sense to do that. Just with regard to the digital evidence, I
24 think what the government's sort of depiction here is rather
25 overstated. For example, with regard to Tamerlan Tsarnaev's

1 computer -- well, first of all, let me just preface this by
2 saying what the government essentially did in its presentation
3 was, for example, from Dzhokhar Tsarnaev's computer, introduced
4 a CD with hundreds of files taken off the computer, some of
5 which we were trying to sort out the night before exactly which
6 ones they were. There was no individualized showing as to
7 which individual file was relevant, the idea was they put
8 together a collection of things from the computer that were
9 consistent with their story, they put it in, and over various
00:53 10 objections that was admitted.

11 With Tamerlan Tsarnaev's computer, we have also
12 collected a segment of files mostly from the encrypted folders
13 he had on his computer, and it's largely a collection of jihadi
14 videos, various kinds of pictures of death and destruction that
15 really show what the man's obsessions were. And again, to the
16 extent part of our attack on the government's case of guilt was
17 to say they were really cherry-picking from the defendant's
18 computer, you know, only the things they thought were bad and
19 not giving the whole picture, we're trying to be a little bit
00:54 20 more inclusive without going overboard and saying, Look, you
21 know, these folders don't show the whole picture. Yes, there
22 may be a few innocuous items in them, but looking at the whole
23 is really what helps you to understand what this man's
24 obsessions were. And so for that reason, the files that are
25 being offered as -- the files in their format were collected

1 and are being offered in that way.

2 As to things like Katherine Tsarnaev's search history,
3 the search history that the expert generated is available to
4 the government. And, you know, I don't, frankly, see any
5 problem with putting the whole thing in. Of course, we are
6 only going to focus on a couple, a couple of searches that
7 Katherine made right around the time that Tamerlan left for
8 Russia. I believe those were culled out and sub-identified as
9 exhibits in the earlier production. If they weren't, they will
00:55 10 be cleaned up and put in the production we're doing today.

11 Again, we're trying to avoid a cherry-picking
12 accusation against ourselves and say, This is the whole. We're
13 going to focus on a couple of parts here. But to the extent
14 you want to have a broader picture and think there's something
15 else that's available for the jury, we do. And so that's sort
16 of been our approach with the digital files.

17 Similarly, in terms of the pictures of the defendant
18 and his niece, if you look at the collection of photographs on
19 the defendant's computer and the collection of photographs on
00:55 20 Tamerlan's computer, yeah, the defendant largely has
21 collections of selfies and photographs of his niece. The
22 equivalent space on Tamerlan's computer is a couple of
23 family-type photographs and then image after image after image
24 of death and destruction in Syria and other places in the
25 world. It's that contrast to the extent that here the computer

1 is really a window into the soul. It's the contrast that we're
2 looking to depict, and I think that's the purpose for which
3 it's being offered.

4 And I guess I would leave it at that. To the extent
5 there are specific issues, I guess we can litigate it.

6 MR. WEINREB: I guess I would respond that to the
7 extent that the defense wishes to draw a contrast that the
8 Court rules on relevant and otherwise admissible, the way
9 that -- normally, I think, the appropriate way of doing that,
00:56 10 the typical way of doing that is one has testimony accompanied
11 by perhaps a few examples, so that it illustrates it for the
12 jury. And in the way that a picture is worth a thousand words,
13 they can see a few pictures and they get the sense of it
14 through their own senses. But there's no need for the actual
15 hundreds and hundreds of pictures to come in. It's cumulative,
16 it's prejudicial. It's more work for the jury, frankly, if
17 they want to do a thorough job than is really appropriate to
18 give them. And it's a normal way of, I think -- a normal kind
19 of 403 balancing to...

00:57 20 MR. FICK: Yes, but we have the collections of
21 hundreds the government put in from the defendant's computer.
22 We're trying in some way to establish the contrast by making a
23 similar submission of our own.

24 THE COURT: All right. We'll see. But again, it
25 sounds like you'll work on being specific as to the opening.

1 And if there's an issue about materials or witnesses for the
2 opening, we'll be able to address it before that happens.

3 Ms. Clarke, are you doing the opening?

4 MS. CLARKE: Mr. Bruck.

5 THE COURT: Mr. Bruck? Okay.

6 MR. WEINREB: Your Honor, I'd just make an oral motion
7 at this point, if that's acceptable, to strike certain of the
8 mitigating factors.

9 THE COURT: I don't know that I have an up-to-date
00:57 10 list. Was there a new one or is it the one that we had about a
11 week ago?

12 MR. WEINREB: As far as I know, it's the same one we
13 had --

14 THE COURT: It went to 15 or something? I don't have
15 it in front of me.

16 MR. WEINREB: There were exactly 15.

17 (Pause.)

18 THE COURT: It's part of Document 1300. And I guess
19 this is uncontroversial that the -- if looks like Attachment 2
00:58 20 to 1300 supersedes the prior December list. Is that fair to
21 say?

22 MS. CLARKE: That's correct. I don't have the
23 document with me. And the government, I think a week or so
24 ago, said they were going to file something on this, and we've
25 been waiting for that. It would be more appropriate for them

1 to file it so we could respond.

2 MR. WEINREB: It's up to the Court. I mean --

3 MS. CLARKE: I'm only saying because Mr. Weinreb
4 represented that he was going to file it by the close of
5 business one day, and we would -- when we were here for an
6 earlier lobby conference. I think it would just be appropriate
7 to do that.

8 THE COURT: Yeah, I think that's a better way to do
9 it. Promptly, obviously, because we would have to decide that
00:59 10 before, I presume, the opening. Maybe not. I mean, maybe
11 there's a way of doing the opening without doing that, but it
12 might be a problem.

13 MR. WEINREB: In addition, the Court ordered that by
14 April 27th -- that before April 27th the parties confer on,
15 among other things, a verdict slip and file it by April 27th.
16 The verdict slip normally has all the aggravating and
17 mitigating factors listed. We've prepared one with the
18 aggravating factors, we assume the defense has prepared one
19 with the mitigating factors, and we'll exchange them and see if
00:59 20 we could file something joint. But again, that will require
21 some ruling on what the permissible mitigating factors are.

22 MS. CLARKE: Maybe the Court should extend that
23 deadline just a couple of days so we could deal with these
24 mitigating factors and --

25 THE COURT: Well, I agree that we'd have to decide

1 what can be included before you can finalize it.

2 MS. CLARKE: True.

3 THE COURT: But since that's a -- what you're
4 submitting is a proposed verdict slip; it's not a final form
5 anyway. I don't think it really matters whether that comes
6 with or without the contested ones. If they're stricken, it
7 just gets revised to strike them, that's all.

8 MS. CLARKE: I think that's correct. I just realized
9 that it's Friday. A lot of things have happened over the past
01:00 10 24 hours that I didn't expect to have happen. And if we could
11 just have a couple more days to try to work with the
12 government.

13 THE COURT: Well, the verdict slip, I think, is more
14 important than the instructions. So I'll give you a break on
15 the instructions.

16 MS. CLARKE: Okay.

17 THE COURT: But the verdict slip really does set the
18 template for the jury's thinking about this, and so I think we
19 should be clear at least as to what the aggravating and
01:01 20 mitigating factors are that will be in play. That will be a
21 guide to evidence admission decisions.

22 MS. CLARKE: Sure. On that note, Judge, I suppose we
23 could do it at sidebar on Monday morning, but we should make
24 our Rule 29 motion as to each and all of the statutory and
25 non-statutory aggravating factors, failure to prove. I want to

1 get that on the record before too much time passes.

2 THE COURT: Okay.

3 MS. CLARKE: And renew, as well, if the Court would
4 look at our motion to strike the duplicative factors. It was
5 Docket 289. We can discuss that with the Court on the record
6 further on Monday, or if this is sufficient.

7 THE COURT: Let me think about it.

8 MR. WEINREB: Your Honor, with respect to this motion
9 about the Waltham triple homicides, I assume given the timing
01:01 10 of it that the defense will not be mentioning them in opening
11 statement on Monday. We're probably not going to have a ruling
12 on it by then.

13 THE COURT: I guess it depends on when you get your
14 response in. But if it isn't ruled on and there's a pending
15 issue, then it can't be referred to. I think that's standard
16 practice.

17 MS. CLARKE: That's correct.

18 MR. FICK: One other housekeeping matter. We had
19 received from the government their closing argument
01:02 20 presentation with the montage of audio and video. We wanted to
21 get that marked for the record just so it's...

22 THE COURT: This is the one that Ms. Conrad has been
23 worried about?

24 MR. FICK: Right. We did get it but now we want to
25 get it marked, so. And I don't know if there's a number we

1 could assign to it or what the Court's --

2 MS. CLARKE: Should we do that on Monday?

3 THE COURT: Yeah, why don't we do that on Monday. The
4 clerk has his method.

5 MS. CLARKE: We did that out of deference to your law
6 clerk.

7 THE COURT: Thank you. I defer to the clerk on those
8 matters.

9 LAW CLERK: All rise. The Court is now in recess.

01:02 10 (The proceedings adjourned at 12:04 p.m.)

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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 5/7/15